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CAJDP | Centre d'assistance juridique en matière de droits de la personne

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Understanding Discrimination and Harassment

This guide is general information only. It is not legal advice about your situation. This guide is not a substitute for a lawyer's research, analysis and judgment. This guide is reliable as of the date of publication (January 2021). You should be aware that the law and procedures under the Human Rights Code (Code) and at the Human Rights Tribunal of Ontario (HRTO) are subject to change without notice.

Introduction

Proving **discrimination** or **harassment** under the **Human Rights Code** (Code) at the **Human Rights Tribunal of Ontario** (HRTO) is harder and more complicated than most people may think or believe. Proving your case of discrimination at the HRTO requires good ***evidence***.

Evidence is used at the HRTO to make findings of **fact**. Most cases decided by the HRTO turn on the facts. Therefore, the evidence you have or may be able to get is very important to your case.

The important thing to understand about evidence and facts is that they are different than your opinions, beliefs, or **arguments**. For example, if you state that you have been discriminated against by someone, you are simply stating your opinion or belief. Your statement (often referred to as a claim or **allegation**) is not evidence or a fact that can help you prove your case at the HRTO.

Here is an example of a fact versus an opinion or argument. In this case, the parties to an HRTO application agree that an employee was terminated from their job.

1. **Fact:** I was terminated from my employment.
2. **Opinion:** I was terminated from my employment due to my disability.

Getting from A to B in the example above requires evidence from you and findings of fact from the HRTO. Mere statements of your belief or opinion as to the reason why you were terminated are not evidence and are not enough to prove discrimination under the *Code* at the HRTO.

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The subject of evidence is discussed in much more detail below. As you read this guide, keep in mind this important distinction above between evidence or facts and opinions or arguments. This will help you understand what evidence you may need to prove your case and how the HRTO may deal with your evidence and make its findings of fact and apply the facts to the **law**.

On this page:

What is the purpose of the Code?

The purpose of the *Code* is to protect Ontarians from discrimination in important areas of their daily lives, such as in renting housing, in the workplace or in accessing and using public services, such as educational, medical or police services.

In order to claim and protect your right to be free from discrimination, it is important to understand what discrimination is and what is prohibited by the *Code* as discriminatory conduct.

If you believe your rights under the *Code* have been violated, it will help to understand how discrimination can be proved *before* you consider starting a legal proceeding to enforce your rights.

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In Ontario, if you think you have been subjected to discrimination, you can file an **application** at the HRTO. Your application will proceed to a hearing before the HRTO if it is not resolved by you and the person or organization that allegedly discriminated against you (referred to as a **respondent**). The obligation is on you, as the applicant, to prove that a respondent's conduct amounted to discrimination under the *Code*.

Many applicants to the HRTO do not have direct evidence of discriminatory conduct. Such evidence could include a **witness** to a racial slur or to an act of **sexual harassment**, or clear, verifiable written records, emails, texts, photographs or other documents that show that a person was treated differently because of a protected characteristic or **prohibited ground of discrimination** under the *Code* (e.g. age, disability, or sexual orientation).

Discrimination may be hidden or subtle and may be the product of unspoken or unconscious beliefs, biases and prejudices. This means that, in many cases, discrimination can only be proved by the drawing of **inferences**by the HRTO from the circumstances surrounding an instance of negative or **adverse treatment**.

In understanding how to prove discrimination, a good place to start is with the legal definition of discrimination. Not all unfair, adverse or negative treatment that you may have experienced is discrimination within the meaning of the *Code*.

The HRTO does not have the power to hear cases that involve general claims of **unfair treatment**not tied or connected to one of the *Code*'s protected characteristics. For a discussion of this legal principle, see *James v Mississauga (City),* 2016 HRTO 13 (CanLII).

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What is discrimination?

Discrimination is not defined in the *Code*. It is defined in the **case law** (or **jurisprudence***)***.** Discrimination usually begins with a distinction or difference in how a person is treated that has a negative impact on that person. Next, for this negative differential treatment to be discriminatory, it must be tied to one of the protected characteristics set out in the *Code.*

Even where a person is treated the same way as others, discrimination can occur if the same treatment has a different and negative impact on the person because of a **protected characteristic,** such as a disability.

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The *Code* prohibits negative treatment based on any of the following seventeen (17) personal characteristics (also referred to as the **prohibited grounds**):

- **Race**
- **Colour**
- **Ancestry**
- **Citizenship**
- **Place of origin**
- **Ethnic origin**
- **Creed (religion)**
- **Sexual orientation**
- **Gender identity**
- **Gender expression**
- **Sex (gender)**
- **Marital status**
- **Family status**
- **Age**
- **Disability**
- **Receipt of social assistance (in housing only)**
- **Pardoned criminal record (in employment only).**

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What is harassment?

The *Code* also prohibits harassment based on a personal characteristic. Harassment may be thought of as a specific type of discrimination.

Under the *Code*, harassment is defined as engaging in a course of **vexatious** comment or conduct that is known or ought reasonably to be known to be unwelcome (see section 10 of the *Code*). Vexatious comments or conduct may include comments or conduct that are upsetting, disturbing or frustrating, among other things.

A common type of *Code* based harassment is sexual harassment, often occurring in the workplace. Employees have a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression (see section 7(2) of the *Code*).

In some cases, workplace harassment can be so severe that a **poisoned work environment** is created. This requires evidence of serious wrongful behaviour that is sufficiently persistent to

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create a hostile work environment, or a particularly horrible single incident of harassment. See *General Motors of Canada Ltd. v. Johnson,* 2013 ONCA 502 (CanLII).

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What is the test for proving discrimination?

To prove discrimination, you must show there is a **nexus** (also referred to as a connection or a link) between the negative treatment you experienced and at least one of the personal characteristics in the *Code.*

Put another way, to prove discrimination, you need to show at your HRTO hearing that you were subjected to negative treatment because of any one of the *Code*-protected personal characteristics.

Even if your personal characteristic is only a part of the reason (as opposed to the only reason) for the negative treatment you experienced, this is enough to prove discrimination under the *Code*.

Answering the following questions can help you determine if you have experienced discrimination that may be proved in a HRTO hearing. To make this clearer, we use the example of disability, but the same questions may be asked in relation to any of the other prohibited grounds or personal characteristics listed in the *Code.*

1. Do you have a disability?
2. Were you treated differently than others?
3. Or, if you were treated the same way as others, did this put you in a different position or have a different impact on you because of your disability?
4. Did this treatment have a negative impact on you or put you at a disadvantage compared to others? and
5. Is there evidence to show a link between the negative treatment or impact that you experienced and your disability?

In many discrimination cases, there is often little dispute about questions 1 to 4 above. Many applicants can establish the existence of a *Code*-protected ground and differential negative treatment. The last question, question 5, is often the most difficult factual and legal issue for the HRTO to determine – were you treated negatively, at least in part, because of your disability?

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Before you file a discrimination claim at the HRTO or elsewhere, you must seriously consider whether the HRTO may be able to answer these five (5) questions in your favour.

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Is the adverse treatment connected to a protected characteristic under the Code?

You may be treated adversely for reasons unconnected to a *Code*-protected personal characteristic. A key consideration in a HRTO hearing is whether there is a connection between your protected characteristic under the *Code* and the adverse treatment you have experienced.

For example, if an employee who identifies as Arab-Canadian is terminated from her employment, she will be able to show at a hearing that she is a person with a personal characteristic that is included in the *Code* as a prohibited ground of discrimination.

This fact will likely be undisputed at the hearing, meaning the employer is unlikely to take a position that the employee is not Arab-Canadian or a racialized person. And if she is the only employee who is fired at that time, she will be able to prove that she was treated differently from other employees and that the impact (i.e., her unemployment) was negative treatment.

However, this will not be enough to prove discrimination at the HRTO hearing. The nexus between the termination and her race also must be proved. That is, she will need to show that her race was a reason for or a factor in the termination. It is not enough for the employee to simply assert that she is Arab-Canadian and that she was terminated from her employment.

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Is it always discriminatory if a person is treated differently because of a protected characteristic under the Code?

No. Not all differences in treatment are necessarily negative and not all adverse treatment is necessarily discriminatory. Sometimes the person alleged to have discriminated (usually an employer, landlord or business) will question whether the applicant was really harmed by being treated differently.

To find discrimination, the HRTO must decide whether the conduct or treatment was truly negative in its impact. Even when a person is treated differently, the HRTO can find that the

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different treatment did not have an adverse impact on the person of a kind that would amount to discrimination under the *Code*.

An example occurs where a Canadian-born white man is not allowed to register in a community program designed to help racialized immigrant women who are isolated at home. In this case, the man is treated differently, because of his sex, race, and place of origin, than a woman who qualifies for the program.

However, the difference in treatment would not be found to be discriminatory. The man is not really harmed by not being allowed into a program (called a **special program** in the *Code*) that is designed to help individuals who are at a disadvantage by virtue of their recent immigration status, gender and race.

The concept of substantive discrimination was developed by human rights tribunals and the courts to describe a negative treatment that impacts on individuals who are already disadvantaged. The *Code* does not aim to eliminate all differences in treatment. Sometimes treating people differently is making them more equal to others.

A key purpose of the *Code* is to address differences or distinctions that have the effect of perpetuating disadvantage or promoting negative stereotypes about individuals who have a protected personal characteristic under the *Code.*

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What is evidence?

In deciding a case, the HRTO relies on the evidence presented by both sides at the hearing. The HRTO weighs the evidence in making its findings of fact, considering its **credibility**, reliability and whether it is useful and relevant to the issues in the dispute.

Fact finding is a very important part of the HRTO's job. Most cases are decided based on the facts found at a HRTO hearing. Each case is different and, while other previous cases may be similar in some respects, the particular and unique facts of a case are often what most determines the HRTO's conclusion about whether discrimination is proved under the *Code*.

Facts are proved by evidence. Evidence comes in two main forms – oral and documentary evidence. Oral evidence is what an applicant, a respondent and any other witnesses say under **oath** at a HRTO hearing – often referred to as testimony.

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Documentary evidence includes written records as well as photographic, electronic or physical evidence. Examples of documentary evidence are letters, e-mails, minutes of meetings, video recordings, etc.

See the HRLSC's Information Sheet on Disclosure of Documents and Witnesses and the *Applicant's Guide to Hearings* for a fuller discussion of how to identify and prepare your evidence. You will find examples of what evidence will be useful for you in preparing for a hearing.

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What is circumstantial evidence?

An applicant cannot always rely on testimony or written documents that directly show that their race, for example, or another personal characteristic in the *Code*, was one of the reasons why they were treated negatively. The evidence in discrimination cases is often indirect.

Indirect evidence is also called circumstantial evidence**.** This means what it says – looking at and weighing all the circumstances of a case to decide whether there is discrimination. Cases that rely solely on circumstantial evidence are more difficult for the HRTO to decide and for an applicant to prove.

Circumstantial evidence requires some reasoning by a tribunal or court in order to prove a fact. This kind of evidence often relates to a series of facts or events that together may prove that discrimination was a factor in the adverse treatment at issue.

An applicant relying on circumstantial evidence will argue that discrimination is proven by the evidence, including related facts or events that, taken together, make it reasonable to conclude that discrimination was involved.

To take a very simple example, if you went to bed and there was no snow on the ground, and you wake up in the morning and see snow on the ground, it is a fact that you did not see it snow. You have no direct evidence that it snowed as you did not see it. The existence of the snow on the ground in your case is circumstantial evidence. A court or tribunal could find as a fact, by reasonable inference from your evidence that there was snow on the ground in the morning, that it snowed during the night while you were asleep.

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The HRTO must decide what conclusions or **inferences** can be drawn from the facts that are proved by the oral and documentary evidence at the hearing. The HRTO will consider if it is reasonable to conclude from its factual findings that an applicant experienced discrimination.

In making its decision, the HRTO considers the evidence brought forward at the hearing by both sides. In most cases, the respondent will present witnesses and documentary evidence to prove an alternative non-discriminatory explanation for the negative treatment.

As an applicant, you must present enough evidence at the hearing to enable the HRTO to find that it is more probable than not that you were treated negatively because of a *Code*-protected personal characteristic. In preparing your case, you need to consider all the available facts and circumstances that may point to a finding of discrimination.

The ultimate issue to be decided by the HRTO is this – does the evidence as a whole make it more likely than not that an applicant was adversely affected because of a *Code*-protected personal characteristic?

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What about the credibility of evidence?

The oral and documentary evidence presented at a hearing is assessed and weighed by the HRTO based on both its **credibility** and its reliability. That is, the HRTO assesses the sincerity of testimony (i.e. credibility) as well as the witness's ability to accurately observe, recall and recount the events at issue (i.e. reliability).

The HRTO will not rely on the evidence of a witness who is not believable. But even where a witness is credible and sincere, their evidence may be unreliable if, for example, there are problems with their memory, or they were not able to closely observe the events at issue.

Findings about the credibility and reliability of evidence are a major element in many discrimination cases, especially when there is conflicting evidence before the HRTO about whether or how an action or event occurred.

In determining issues of credibility, the HRTO often cites the following excerpt from *Faryna v. Chorny, (1952) 2 D.L.R. 354 (B.C.C.A.)* at pages 356-357:

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Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility….

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions…Again a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken."

This is very important to understand and appreciate. Most cases decided at the HRTO depend on findings of fact which, in turn, often depend on the HRTO's assessments of the witnesses' credibility.

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What if the evidence about a respondent's actions is in a respondent's possession?

Often, respondents have the information applicants need to determine why the respondents acted as they did as, for example, in firing an employee or changing an employee's conditions of work. As discussed above, the respondent's evidence will be used by the HRTO in determining what happened and why.

The HRTO Rules allow applicants to request documentary evidence in the respondent's possession before the hearing. This is an important part of preparing for your hearing.

For information on how an applicant can obtain information and records in the respondent's possession, see the HRLSC's Applicant's Guide to Hearings and **Disclosure** *of Documents and Witnesses*.

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Does a protected characteristic under the Code have to be the only factor in a discriminatory act?

No. An applicant does not need to prove that discrimination was the only, or even the primary, factor in the negative treatment by a respondent. It is enough if one of the reasons for the negative treatment is connected to a *Code* ground.

Therefore, even if there are several reasons for the negative treatment, your discrimination claim will be accepted by the HRTO if you can show through your evidence that a *Code*-protected personal characteristic was one of the factors in that treatment.

For example, if the HRTO found that your age and a corporate reorganization were both factors in being terminated from your job, that would mean that your age was a factor in your termination. That would be enough to prove discrimination under the *Code*.

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Do I have to prove an intent to discriminate?

No, except in one situation under the *Code*, namely, **reprisal**.

You do not have to prove that the respondent intended to discriminate against you. The focus of the HRTO's enquiry is on whether the respondent's actions had a negative effect on you and whether a prohibited ground of discrimination was a factor in that treatment.

However, there is one type of *Code* breach that does involve proving the intention of a respondent. Section 8 of the *Code* prohibits reprisal against a person for claiming or enforcing their rights under the *Code*.

This means that an applicant must prove that a respondent engaged in an action which was intended as a retaliation for claiming or enforcing a *Code* right. For a discussion of section 8 and reprisal see *Noble v. York University*, 2010 HRTO 878 (CanLII).

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What amount of proof is needed to prove discrimination?

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An applicant at the HRTO is required to prove that discrimination occurred. This means you must be able to prove that it is more likely than not that the protected personal characteristic was a factor in the negative treatment you experienced.

This is called the **burden of proof**. In **civil law** cases, including HRTO cases, this means that you must prove your case on a **balance of probabilities.** This is sometimes described as "50% plus 1" probability. This contrasts with **criminal law** cases, where the burden of proof is **beyond a reasonable doubt**.

The HRTO will examine the relevant evidence presented at the hearing by the applicant and the respondent to determine whether it is more likely than not that a violation of the *Code* occurred. Both the applicant and the respondent are responsible for bringing forward evidence at the hearing to prove their position.

The applicant has the initial responsibility of establishing a basis for a finding of discrimination. This is called making out a ***prima facie*** case of discrimination. This means that an applicant at a hearing must produce their evidence first and must produce enough evidence which, if believed, would support a finding of discrimination.

If the applicant does this, then the respondent must present evidence to challenge the applicant's evidence. The respondent will bring evidence to the hearing to show its actions were not discriminatory or to establish a statutory defence under the *Code* which justifies the discrimination (discussed below).

An example is helpful. If your application alleges that disability was a factor in the termination of your employment, there are three (3) initial components of your claim that need to be proved:

1. That you have a disability;
2. That you were fired, and other employees were not fired (i.e. negative differential treatment); and
3. That your disability was at least one of the reasons *why* you were fired.

With respect to the question of why you were fired, what you require is evidence of a connection between the termination and your disability. Your disability must have been a factor in the decision to end your employment.

Establishing only that you were terminated, and you are disabled may not be enough to make out your *prima facie* case. If that was enough, then every person with a disability who loses their job would be able to prove discrimination, even if the employer terminated all employees in the same position, including employees without disabilities.

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In order to prove discrimination, an applicant's evidence must establish the basis upon which the HRTO could find that the applicant was adversely impacted due, at least in part, to a prohibited ground under the *Code*.

If an applicant is only able to prove #1 and #2 above, then the applicant has not made out a *prima facie* case and the HRTO may dismiss the application.

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What defenses can a respondent raise against a claim of discrimination?

A respondent can defend against a discrimination allegation in two (2) main ways – by establishing a credible, non-discriminatory explanation for their actions, or relying on a statutory defense under the *Code* that justifies the discrimination.

An example of the first kind – non-discriminatory explanation – occurs where, for example, a respondent presents enough evidence to show that the reason for the termination of an applicant's employment was poor performance or an organizational restructuring unconnected to the applicant's protected personal characteristic under the *Code.* In this case, the HRTO may accept the respondent's explanation for the termination of employment as being non-discriminatory.

An example of the second kind – a statutory defense – would be a licenced bar that relied on the *Liquor Licence Act* to defend itself in an HRTO application involving under-age consumption of alcohol. If an eighteen (18) year old customer brought an HRTO application against a restaurant claiming discrimination after being refused alcohol on the basis of age, the restaurant could rely on section 20(2) of the *Code*.

Section 20(2) states that the minimum drinking age of nineteen years, as set out in the *Liquor Licence Act*, does not violate the right to equal treatment based on age under section 1 of the *Code*. Section 20(2) is a statutory defense to the claim of discrimination.

Other examples of statutory defences include sections 24 and 25 of the *Code* which set out various exceptions to claims of employment- related discrimination. The statutory defences available under the *Code* are diverse but generally recognize other societal values that outweigh the right to equal treatment in some very specific and limited circumstances.

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What defenses can a respondent raise against a claim of harassment?

A respondent can defend against an allegation of harassment by establishing a credible, non-discriminatory explanation for their actions. There are no statutory defenses available under the *Code* that justify *Code*-based harassment.

Defences to claims of harassment under the *Code* tend to fall into one of two categories. First, that the conduct alleged to be harassment, while potentially annoying or bothersome, does not meet the definition of harassment within the meaning of the *Code* (see section 10).

For example, there may be a personality conflict or strong disagreements between an older employer and a younger employee that cause friction and stress in the workplace. However, this does not necessarily mean that the younger employer's conduct is age-based harassment under the *Code*.

Second, the conduct in question may be harassment but the harassment is not *Code* related. This means that a reason for the harassment is not connected to a ground of discrimination, such as age, race, disability or sex.

For example, if an employee is faced with conduct that may be reasonably seen as harassment in the workplace, an employer may claim that it has nothing to do with the employee's disability or any other *Code* prohibited grounds of discrimination.

The employer's conduct may be unfair and wrong, but that conduct may not be connected to the *Code*. There may be, in such cases, another **legal forum** to deal with the harassment at work, such as a **tort** claim in the courts, a **grievance** under a collective agreement, or a complaint under the Occupational Health and Safety Act (OHSA).

In the courts, an example is the tort of intentional infliction of emotional distress. This allows individuals to claim severe emotional distress caused by another individual who intentionally or recklessly inflicted this distress on a person by behaving in an extreme and outrageous way.

The *OHSA* sets out the rights and duties for the health and safety of all individuals in the workplace, including rights and duties related to workplace violence and harassment. For example, offensive or intimidating comments or jokes, bullying or aggressive behaviour and displaying or circulating offensive pictures or materials are some examples of workplace harassment that may be a breach of the *OHSA*.

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